FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 811.

GENERAL UTILITIES & OPERATING COMPANY,
Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

LAURENCE ARNOLD TANZER,
JOHN W. TOWNSEND,
As Amici Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 939.

GENERAL UTILITIES & OPERATING COMPANY,
Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Now come Laurence Arnold Tanzer and John W. Townsend, attorneys and counsellors of this court, and, representing that the petition for certiorari herein involves matters of general interest affecting the rights of clients represented by them, pray leave to file the annexed brief as *amici curiae* in support of the petition for certiorari herein, counsel for both parties consenting thereto.

Respectfully submitted,

LAURENCE ARNOLD TANZER,
JOHN W. TOWNSEND,
As Amici Curiae.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

The purpose of this brief is to call to the Court's attention the general importance of the question presented, and the dangerous and far-reaching character of the precedent established by the decision of the Circuit Court of Appeals.

The question presented is whether the distribution of property by a corporation to its stockholders, and the subsequent sale of the property by the stockholders, can be disregarded, and the sale treated as if made by the corporation, solely because the transaction was motivated by a desire to avoid double taxation.

The facts are undisputed, having been stipulated by the parties and found by the Board of Tax Appeals. The petitioner here would not make the proposed sale, because it would involve a tax payable by petitioner, and a second tax payable by its stockholders upon the distribution to them of the proceeds. Instead, it distributed the property to its stockholders, and they made the sale.

The holding of the Circuit Court of Appeals that "The sale of the stock in question was, in substance, made by the respondent company, through the stockholders as agents or conduits through whom the transfer of the title was effected" is contrary to the facts as stipulated and found, and amounts to a finding by the Circuit Court of Appeals of a fact (that the stockholders acted as agents for the corporation) not warranted by the evidence nor found by the Board, and which the Circuit Court of Appeals had no power to make (*Helvering* v. *Rankin*, ... U. S. ...., decided April 29, 1935).

The only justification offered by the Circuit Court of Appeals for thus disregarding the actual transaction is that "The transaction was deliberately planned and carried out for the sole purpose of escaping taxation * * * the details were worked out for the express and admitted purpose of avoiding the payment of the tax."

The court below thus holds that what the parties have actually done can be disregarded solely because done with the motive to reduce taxation. That holding is subversive of well settled principles: if allowed to stand, the validity and effect of every transaction, and the possible tax liability resulting therefrom, will be open to question, depending on future litigation and determination of the motive, rather than of the character of the transaction itself.

The decision is in direct conflict with the rule laid down by this Court in *United States* v. *Phellis*, 257 U. S. 156, 172, that "what was done, rather than the design and purpose of the participants, should be the test." The decision is likewise in direct conflict with the principle enunciated by this Court in *Gregory* v. *Helvering*, 293 U. S. 465, 469, that "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. *United States* v. *Isham*, 17 Wall., 496, 506; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395-6; *Jones* v. *Helvering*, 63 App. D. C. 204, 71 F. (2d) 214, 217. But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended."

In the *Gregory* case the Court, inquiring into the actual transaction, as distinguished from the motive, held that a transfer of assets by one corporation to another, whose stock was distributed to the taxpayer, was not a reorganization within the meaning of the statute there under consideration because it was "an operation having no business or corporate purpose," and sustained the Commissioner in holding the distribution to be a taxable dividend. Applying the same test to what was done in the case at bar, the distribution by the petitioner to the stockholders was a distribution of corporate property, taxable to the stockholders as a dividend, and vesting the ownership of the property distributed in them; the subsequent sale was a sale by the stockholders and not by the corporation.

In the *Gregory* case this Court relied upon and cited with approval the decision of the Court of Appeals of the District of Columbia in *Jones* v. *Helvering*, 71 F. (2d) 214, 217, certiorari denied 293 U. S. 583, which case is directly in point here. In that case the stockholders of a closely held corporation, for the admitted purpose of reducing taxation by registering a loss resulting from the depreciation in value of securities owned by them, sold the securities to the corporation. The court rejected the view that the admitted purpose to escape taxation, or the fact that the stockholders were dealing with a corporation wholly controlled by them, could give rise to tax liability, and sustained the taxpayers in deducting the loss, saying at page 217:

> "That brings us back to the single query whether the possession of the power to do the thing the Board denounces, that is to say, the ability through stock ownership to control the corporate action, is sufficient to make a sale otherwise unobjectionable subject to be treated as a nullity for tax purposes. The only argument that can be urged in the affirmative is that it is against public policy to allow a taxpayer to incorporate his business in such a way as through manipulation or transfers between himself and it he can place the one or the other beyond the reach of the taxing statutes, and there is great force to the argument. But, so far as we know, in cases where the element of fraud in fact is lacking, it has been the invariable holding that a taxpayer may resort to any legal methods available to him to diminish the amount of his tax liability. *Bullen* v. *State of Wisconsin*, 240 U. S. 625, 630, 36 S. Ct. 473, 60 L. Ed. 830. In *Iowa Bridge Co.* v. *Commissioner, supra*, at page 781 of 39 F. (2d), Judge Gardner, speaking for the Court of Appeals in the Eighth Circuit, said: 'In fact, it is held that even though the transaction is a device to avoid the burden of taxation, or to lessen that burden, it is not for that reason alone illegal.' See also *United States* v. *Isham*, 17 Wall. 496, 506, 21 L. Ed. 728."

To the same effect see *Commissioner* v. *Dyer*, 74 F. (2d) 685 (C. C. A. 2).

In disregarding the distinction between the corporate entity and the stockholders and attributing to the corporation acts which on the facts stipulated and found were the acts of its stockholders, the decision is in conflict with a long line of decisions of this Court, cited in *Jones* v. *Helvering, supra.*

It is respectfully submitted that the decision below is an erroneous and dangerous precedent, and that certiorari should be granted.

LAURENCE ARNOLD TANZER,
JOHN W. TOWNSEND,
As Amici Curiae.